



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

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AUG 17 2004

Joseph W. Russell, Chairperson
Montana Board of Environmental Review
P.O. Box 200901
Helena, MT 59620-0901

Subject: EPA Approval of Montana's New Classifications
and Water Quality Criteria for Low Flow Waterbodies

Dear Mr. Russell:

The U.S. Environmental Protection Agency, Region 8 (EPA) has completed its review of Montana's revised Surface Water Quality Standards and Procedures, Chapter 30, Sub-Chapters 5, 6 and 7. The revisions: 1) apply both acute and chronic aquatic life standards in Circular WQB-7 to the new D-2, E-2, and F-1 classifications; 2) add a "saline tolerant aquatic life use" to the new E-5 classification, which includes language assuring existing and designated uses applicable to this classification will be supported; and 3) clarify that the narrative "free from" standards applicable to aquatic life use protection apply to these four new classifications. The revisions were made in response to EPA's June 19, 2003 disapproval of certain elements of Montana's new classifications for low flow and seasonal waterbodies.

The revisions were adopted by the Montana Board of Environmental Review (Board) on March 26, 2004 and were submitted to EPA for review with a June 2, 2004 letter from Jan P. Sensibaugh, Director of the Montana Department of Environmental Quality (DEQ). The submittal package included: 1) the revised water quality standards with a rationale for the revisions made; 2) a statement from the Attorney General's Office certifying that the revisions were duly adopted pursuant to State law; and 3) a response to public comment. Receipt of the revised standards on June 8, 2004 initiated EPA's review pursuant to Section 303(c) of the Clean Water Act (CWA) and the implementing federal water quality standards regulation at 40 CFR Part 131. EPA has completed its review, and this letter is to notify you of our action.

AGENCY REVIEW

The Clean Water Act, Section 303(c)(2), requires States and authorized Indian Tribes to submit new or revised water quality standards to EPA for review. EPA is to review and approve



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or disapprove the submitted standards. Pursuant to CWA Section 303(c)(3), if EPA determines that any standard is not consistent with the applicable requirements of the Act, the Agency is to notify the State or authorized Tribe and specify the changes to meet such requirements. If such changes are not adopted by the State or authorized Tribe within ninety days after the date of notification, EPA is to promptly propose and promulgate such standard pursuant to CWA Section 303(c)(4). EPA's goal has been, and will continue to be, to work closely with States and authorized Tribes throughout the State or Tribal standards revision process as a means to avoid the need for a disapproval action, and where disapproval is unavoidable within the statutory deadlines, to explore with the State or authorized Tribe an acceptable resolution that will make federal promulgation unnecessary.

TODAY'S ACTION

Today, EPA is acting on revisions to Sub-Chapters 5, 6 and 7 that address EPA's June 19, 2003 disapproval of certain elements of Montana's new classifications for low flow and seasonal waterbodies. In its disapproval action, EPA concluded that the limited water quality criteria assigned to three of the new use classifications and the lack of an aquatic life use for another classification were inconsistent with the requirements of the CWA and EPA's implementing regulation. The revisions adopted by the Board on March 26, 2004 appropriately resolve EPA's disapproval by: 1) applying the acute and chronic aquatic life standards in WQB-7 to the D-2, E-2, and F-1 classifications; 2) adding a "saline tolerant aquatic life use" to the E-5 classification, which includes language assuring existing and designated uses applicable to this classification will be supported; and 3) clarifying that the narrative "free from" standards applicable to aquatic life use protection apply to these four new classifications.

The adopted revisions also include a proviso noting that, for non-priority pollutants, the acute and chronic aquatic life WQB-7 standards may be adjusted or removed based on a site-specific demonstration that such a change is warranted. The revisions further clarify that a use attainability analysis (UAA) will be needed to support assigning any of the new classifications to a specific waterbody and that the UAA process will provide, as well, the opportunity to evaluate the appropriateness of the acute and/or chronic aquatic life standards in WQB-7. The revised rule and the supporting rationale explain that such UAA-based revisions will require a rule change that will be subject to review by the public and EPA. Finally, WQB-7 was amended to indicate which of the listed, numeric standards are priority pollutants and which are non-priority pollutants. A number of sections in Sub-chapters 5, 6 and 7 were then amended to reference this revised, January 2004 version of WQB-7.

I am pleased to inform you that today EPA is approving revisions to Montana's Surface Water Quality Standards and Procedures, Chapter 30, Sub-Chapters 5, 6 and 7 adopted by the Board on March 26, 2004. EPA has concluded that the revisions to Sections 17.30.615, 651, 653, 656 and 657 are appropriately protective of the designated uses assigned to these

classifications and are consistent with the requirements of the CWA and EPA's implementing regulation at 40 CFR Sections 131.10 and 131.11. Accordingly, these revisions are approved. The supporting revisions to Sub-Chapters 5, 6 and 7, e.g., incorporation of reference to the January 2004 version of WQB-7, are approved as well.¹

EPA's approval of revisions to Montana's Surface Water Quality Standards and Procedures, Chapter 30, Sub-Chapters 5, 6 and 7 does not apply to waterbodies that are within Indian country, as defined in 18 U.S.C. Section 1151. In Montana, "Indian country" includes the Blackfeet, Crow, Flathead, Fort Belknap, Fort Peck, Northern Cheyenne and Rocky Boys Indian Reservations. This letter is not intended as an action to approve water quality standards applying to waters within Indian country. EPA, or eligible Indian tribes, as appropriate, will retain responsibilities for water quality standards for waters within Indian country.

ENDANGERED SPECIES ACT REQUIREMENTS

It is important to note that EPA's approval of Montana's revisions to Sub-chapters 5, 6 and 7 is considered a federal action which may be subject to the Section 7 consultation requirements of the Endangered Species Act (ESA). Section 7 of the ESA states that "all other federal agencies shall ... utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species..." and "each federal agency ... shall ... insure that any action authorized, funded or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined to be critical..." EPA's approval of the water quality standards revisions, therefore, may be subject to the results of consultation with the U.S. Fish and Wildlife Service pursuant to Section 7(a)(2) of the ESA. Nevertheless, EPA also has a Clean Water Act obligation, as a separate matter, to complete its water quality standards action. Therefore, in approving Montana's water quality standards revisions today, EPA is completing its CWA Section 303(c) responsibilities.

For ESA purposes, it is important to note that the new use classifications cannot be assigned to a specific waterbody until: 1) a use attainability analysis, supporting a classification change, is completed, and 2) based on that analysis, the Board adopts a revised classification. These site-specific revisions to the State rule will be subject to review by the public and EPA. EPA's action on the new classifications, therefore, is not an action that may have an effect on listed species. This is because our action today does not change applicable standards for any waterbody and is only an intermediate-step that will require further action (i.e., application of the

¹ A number of the supporting revisions jointly address surface water and ground water. Although EPA is interested in the protection of ground water quality and has a number of programs invested in the protection of that resource, our CWA Section 303(c) approval and disapproval authority does not apply to ground water. Today's action, therefore, does not specifically address Montana's water quality standards provisions applicable to ground water.

new classifications, through rulemaking, to specific waterbodies). As a result, our approval of the new use classifications is not subject to the consultation provisions of the ESA. Any future application of the new classification system arising from our approval action today will trigger an ESA evaluation and will be appropriately addressed at that time. For today's action, therefore, the Region is making a "no effect" finding, and no consultation with the U.S. Fish and Wildlife Service is required.

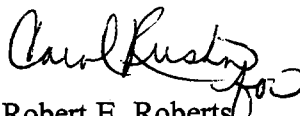
CONCLUSION

The revisions adopted by the Board appropriately resolve EPA's June 19, 2003 disapproval of certain elements of Montana's new classifications for low flow and seasonal waterbodies. The Board and the DEQ are commended for their constructive approach to resolving EPA's concerns and for their work in amending the water quality standards to include new classifications and water quality criteria for low flow and seasonal waterbodies.

The addition of these new use classifications to Montana's water quality standards significantly and appropriately refines the previous classification system. These refined use classifications provide an improved level of precision in the water quality standards and should allow the State to tailor assigned levels of protection to better match existing and attainable aquatic communities, aiming for water quality criteria that are neither over- nor under-protective.

If you have questions concerning this letter, please call Max Dodson, Assistant Regional Administrator, Office of Ecosystems Protection and Remediation at 303-312-6598, or have your staff contact Bill Wuerthele, Regional Water Quality Standards Coordinator, at 303-312-6943.

Sincerely,



Robert E. Roberts
Regional Administrator

cc: Jan P. Sensibaugh, Director, Montana Department of Environmental Quality
R. Mark Wilson, Field Supervisor, Montana Field Office, U.S. Fish and Wildlife Service
John Wardell, Director, EPA Montana Operations Office
Donna Davis, Chief, WQSB, EPA Headquarters